

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

MAY 26 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

KENNETH W. REED,

Plaintiff/Appellant,

v.

DORA B. SCHRIRO,

Defendant/Appellee.

)
)
) 2 CA-CV 2010-0219
) DEPARTMENT B

) MEMORANDUM DECISION
) Not for Publication
) Rule 28, Rules of Civil
) Appellate Procedure
)
)

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CV201001080

Honorable Craig A. Raymond, Judge Pro Tempore
Honorable Bradley M. Soos, Judge Pro Tempore

APPEAL DISMISSED

Kenneth W. Reed

San Luis
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Kenneth Reed appeals from the trial court's order dismissing without prejudice Reed's civil rights complaint against appellees, employees of the Arizona Department of Corrections (ADOC). On appeal, Reed argues the court's denial of his application for deferral of the costs to serve process on appellees precluded him from joining any prospective defendants to the action and therefore denied him the right to petition the courts for redress of grievances and his rights to due process of law and equal protection guaranteed by the United States Constitution. For the reasons set forth below, we dismiss Reed's appeal for lack of jurisdiction.

Factual and Procedural Background

¶2 In March 2010, Reed, an ADOC inmate, filed a civil rights lawsuit in Pinal County Superior Court against several current and former employees of ADOC. In his complaint, Reed alleged he had been transferred between various prison units in August 2006 and May 2007 in retaliation for his exercise of his right to petition the government for redress of grievances. The trial court initially granted Reed a deferral of the filing fees and the costs and fees for service of process. However, the court subsequently ordered Reed, pursuant to A.R.S. § 12-302(E), to pay the filing fee in full and ordered ADOC to withhold the fee amount from Reed's inmate account, to be paid to the clerk of the court in installments.

¶3 Reed then filed a motion for deferral of the costs to serve process on the defendants. He also requested an order directing various sheriffs' offices to complete service and an extension of time to effectuate service of process. The trial court denied Reed's motions and ordered the case to be "plac[ed] . . . on the Inactive Calendar for

Dismissal Without Prejudice on Monday, December 20, 2010.” Reed filed a motion for reconsideration and a motion requesting alternative or substituted service on the defendants, both of which were denied by the court in August 2010. The court also issued an order “accelerating the [placement of Reed’s case] on the Inactive Calendar for Dismissal” to October 15, 2010. Reed failed to serve the defendants, and, on November 5, 2010, the trial court dismissed Reed’s complaint without prejudice for lack of prosecution. Reed filed his notice of appeal on December 6, 2010.¹

Discussion

¶4 The notice of appeal states that Reed is appealing the trial court’s order dismissing his complaint without prejudice. However, Reed presents no argument or authority supporting a challenge to the court’s dismissal order in his brief. “Issues not clearly raised and argued on appeal are waived.” *ELM Retirement Ctr., LP v. Callaway*, 226 Ariz. 287, n.1, 246 P.3d 938, 943, n.1 (App. 2010); *see also* Ariz. R. Civ. App. P. 13(a)(6). Even assuming Reed had properly challenged the trial court’s dismissal order, we lack jurisdiction to address Reed’s appeal in any event.

¶5 “This court may not address an issue or provide relief if it lacks jurisdiction to do so and we have an independent duty to ensure that we have jurisdiction before

¹Although Reed filed a notice of appeal on the thirty-first day after the trial court dismissed his complaint, Reed’s appeal was timely. A notice of appeal must be filed “no[] later than 30 days after the entry of the judgment from which the appeal is taken.” Ariz. R. Civ. App. P. 9(a). And “where the appeal is not timely filed, the appellate court acquires no jurisdiction other than to dismiss the attempted appeal.” *Edwards v. Young*, 107 Ariz. 283, 284, 486 P.2d 181, 182 (1971). However, Reed was in custody when he filed the notice of appeal. And a notice is deemed filed the day a pro se prisoner delivers it to prison officials. *Houston v. Lack*, 487 U.S. 266, 273-74 (1988); *Mayer v. State*, 184 Ariz. 242, 244, 908 P.2d 56, 58 (App. 1995).

addressing the merits of any claim raised on appeal.” *State v. Bejarano*, 219 Ariz. 518, ¶ 2, 200 P.3d 1015, 1016 (App. 2008). And generally, an appeal lies only from a final judgment. *See* A.R.S. § 12-2101(B). An order of dismissal without prejudice does not qualify as an appealable order because it “is not a final determination of the controversy on its merits, and is no bar to the prosecution of another suit timely commenced, founded upon the same cause of action.” *State ex rel. Hess v. Boehringer*, 16 Ariz. 48, 51, 141 P. 126, 127 (1914). Therefore, the trial court’s order dismissing Reed’s complaint without prejudice is not appealable. *L.B. Nelson Corp. of Tucson v. W. Am. Fin. Corp.*, 150 Ariz. 211, 217, 722 P.2d 379, 385 (App. 1986).

¶6 We recognize that in certain limited instances, an order of dismissal without prejudice may be appealable. Section 12-2101(D) permits a party to file a direct appeal from “any order affecting a substantial right . . . when the order in effect determines the action and prevents judgment from which an appeal might be taken.” “The classic example of an order falling under § 12-2101(D) is a dismissal without prejudice entered after the statute of limitations has run. Absent a savings statute, unless that non-final order can be appealed, it ‘in effect determines the action,’ as any refiled action would be barred.” *Garza v. Swift Transp. Co.*, 222 Ariz. 281, ¶ 15, 213 P.3d 1008, 1011 (2009), *citing McMurray v. Dream Catcher USA, Inc.*, 220 Ariz. 71, ¶ 4, 202 P.3d 536, 539 (App. 2009). This situation is not present here.² And, as we have noted, Reed has not

²Although we do not address the merits of Reed’s civil rights complaint, it appears the applicable limitations period for filing his claims expired before the action was filed. In the complaint, Reed alleged violations of his constitutional rights had occurred in August 2006 and May 2007. Based on the applicable statute of limitations, he had two

challenged the dismissal order in his brief, much less argued the court's order constitutes an appealable order.

¶7 We also lack jurisdiction to address Reed's sole argument on appeal—that the trial court erred in denying his application for deferral of the costs for service of process. First, Reed's notice of appeal does not mention this order and this court “acquires no jurisdiction to review matters not contained in the notice of appeal.” *Lee v. Lee*, 133 Ariz. 118, 124, 649 P.2d 997, 1003 (App. 1982). And second, the court's order denying Reed's application for waiver or deferral of the costs was interlocutory in nature and therefore is not appealable. An order is interlocutory when it “does not resolve a matter on the merits and may or may not be essential to the judgment.” *State v. Whelan*, 208 Ariz. 168, ¶ 22, 91 P.3d 1011, 1017 (App. 2004). Such orders are only reviewable by special action. *Ariz. Dep't of Econ. Sec. v. Kennedy*, 143 Ariz. 341, 343, 693 P.2d 996, 998 (App. 1985). Reed has not requested us to accept special action jurisdiction, and we would decline to do so in any event. *See Robinson v. Kay*, 225 Ariz. 191, ¶ 7, 236 P.3d 418, 420 (App. 2010) (special action jurisdiction discretionary).

years from those dates within which to file his 42 U.S.C. § 1983 claims. *See* A.R.S. § 12-542 (two-year statute of limitations in personal-injury torts); *Wallace v. Kato*, 549 U.S. 384, 387 (2007) (limitations period for § 1983 actions “is that which the State provides for personal-injury torts”). And, because the limitations period expired before Reed filed his complaint in March 2010, A.R.S. § 12-2101(D) does not apply.

Disposition

¶8 For the reasons stated above, we dismiss Reed’s appeal for lack of jurisdiction.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge